Supreme Court, U.S.
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No. 94-1842

In The

Supreme Court of the United States

October Term, 1994

MYERS & ASSOCIATES, LTD., RICHARD J. MYERS, AND EDWARD D. GILHOOLY,

Petitioners,

v.

TRINITY INDUSTRIES, INC.,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether Petitioners Myers & Associates, Ltd. and Richard J. Myers are subject to personal jurisdiction in Texas, when Texas-based Respondent Trinity Industries, Inc.'s causes of action arise out of or relate to Petitioners' multiple and voluntary contacts with Texas.

LIST OF PARTIES

The following are parties in this case:

Trinity Industries, Inc.
Myers & Associates, Ltd.
Richard J. Myers
Edward D. Gilhooly

RULE 29.1 LISTING

The following are the parent companies and non-wholly owned subsidiaries of Trinity Industries, Inc.:

Trinity Balco, Inc.
Productos de Carretera, Inc.

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OPINIONS BELOW

The Petition for Writ of Certiorari correctly describes the opinion below.

STATEMENT OF JURISDICTION

The Petition for Writ of Certiorari correctly describes this Court's jurisdiction.

STATEMENT OF THE CASE

On July 7, 1993, Trinity Industries, Inc. ("Trinity") filed suit against Myers & Associates, Ltd., Richard J. Myers, and Edward D. Gilhooly. In this brief, Trinity refers to these defendants as the "Myers Firm," "Myers," and "Gilhooly"; and it refers to the Myers Firm and Myers collectively as the "Myers defendants." After removing the case to federal court, R1 at 1, 15, all the defendants moved to dismiss the case for lack of personal jurisdiction on August 25, 1993. R1 at 38. The Myers defendants accompanied their motion with an Affidavit of Richard J. Myers that addressed the personal jurisdiction issues. R1 at 60.

Trinity deposed Myers and Gilhooly on the personal jurisdiction issues. During the deposition of Myers, it became apparent that several statements in his affidavit were incorrect. The Myers defendants filed with the district court an Advisory to Court Regarding Modifications to the Affidavit of Richard J. Myers. R1 at 86. In that document, they explained that "[d]uring the examination

of Mr. Myers, certain errors in the Affidavit filed became apparent." R1 at 86-87. The purpose of the Advisory to the Court was to correct those "errors" "[i]n an effort to clarify any misunderstanding and so as not to mislead either the Court or opposing counsel." R1 at 87.

Trinity filed its response to the dismissal motions on November 1, 1993. R2 at 1. On November 30, 1993, the district court entered an Order granting defendants' motions to dismiss and entered Final Judgment in the case. R1 at 143, 148.

Trinity filed its notice of appeal on December 21, 1993. R1 at 149. In a unanimous opinion, a panel of the Fifth Circuit reversed and remanded, finding that the Myers defendants' contacts with Texas were such that subjecting them to personal jurisdiction in Texas would not offend due process. The Fifth Circuit also sustained jurisdiction over defendant Gilhooly even though his contacts with Texas were fewer than those of the Myers defendants. *Trinity Indus. v. Myers & Associates*, 41 F.3d 229, 231-32 (5th Cir. 1995), *petition for cert. filed*. The Myers defendants then filed their Petition for Writ of Certiorari with this Court. Defendant Gilhooly has not filed a Petition for Writ of Certiorari.

STATEMENT OF FACTS

Trinity is headquartered in Dallas, Texas. Its business focuses primarily on heavy metal products, including the manufacture of rail cars. One of Trinity's competitors in the rail business is a company called Johnstown America Corporation ("Johnstown America"). On December 11,

1992, Johnstown America filed a patent infringement lawsuit against Trinity in the United States District Court for the Western District of Pennsylvania.

The defendants – Chicago lawyers and their law firm – were Trinity's lawyers. They represented Trinity on an ongoing basis from 1984 through at least early 1993. R2 at 19-20. As of February 1993, the Myers Firm was still handling more than forty matters for Trinity. R2 at 20. During the course of that representation, the defendants learned confidential information about Trinity's business. R2 at 19.

Since the filing of the Johnstown America patent infringement action against it, Trinity has learned that its own lawyers, the defendants in this case, in violation of the fiduciary duty that they owed their then present client Trinity, assisted and counseled Johnstown America in the preparation, filing, and prosecution of the infringement suit. Trinity responded by filing this lawsuit in the Northern District of Texas.

The Myers defendants' Petition for Writ of Certiorari is littered with factual misstatements. Pursuant to Supreme Court Rule 15.1 (1995), Trinity takes this opportunity to point out several of those misstatements. (On May 18, 1995, the Myers defendants tried to correct some, but not all, of these factual misstatements by providing correction stickers to be applied to particular pages of their Petition.)

The Myers defendants assert that they "have absolutely no contacts with Texas." Petition at 24. This is wrong. Among their many contacts with the State of Texas are the following:

- *Numerous trips to Dallas.* The Myers defendants made numerous trips to Dallas to meet with Trinity personnel. R2 at 20, 40, 59, 61. Myers "personally attended several meetings in Texas during which [he] provided legal services to Trinity." R2 at 40;
- *Represented Dallas-based Trinity on scores of matters.* The Myers defendants handled numerous matters for Dallas-based Trinity, more than forty as of February 1993. R2 at 3, 20, 49, 64;
- *Were paid for work performed in Texas.* The Myers defendants were paid for legal work performed in the State of Texas. R2 at 40, 65;
- *Conferred with third parties in Texas.* The Myers defendants conferred with other parties in Texas on behalf of Trinity. R2 at 62;
- *Reported to Trinity's Dallas headquarters.* The Myers defendants received legal assignments from and reported to the Dallas headquarters of Trinity. R2 at 19, 40-42, 51, 58-60;
- *Made numerous calls to Trinity's Dallas headquarters.* Myers made numerous telephone calls to the Dallas headquarters of Trinity. R2 at 19, 42;
- *Received calls from Trinity's Dallas headquarters.* Myers received telephone calls from the Dallas headquarters of Trinity. R2 at 42, 50;
- *Sent correspondence to Trinity's Dallas headquarters.* The Myers defendants corresponded with persons in the Dallas headquarters of Trinity. R2 at 42-43, 60;
- *Received correspondence from Trinity's Dallas headquarters.* Myers received correspondence

from Dallas-based Trinity personnel. R2 at 41-42;

- *Sent bills to Trinity's Dallas headquarters.* Myers submitted monthly fee statements to the Dallas headquarters of Trinity. R2 at 19, 27-28; and

- *Received payments from Trinity's Dallas headquarters.* Myers received payments by check from the Dallas headquarters of Trinity. R2 at 19.

The Myers defendants even represented Trinity as its primary trial counsel in a federal court case in the Northern District of Texas. R2 at 19, 26. In that Texas litigation, Myers and the Myers Firm filed a Motion to Appear Pro Hac Vice as Trinity's trial counsel, stating in the motion they understood that "by appearing in this case they are subject to the rules of this Court as members of the bar of this District, and agree to be bound thereby." R2 at 47. The Texas court granted that motion, allowing the Myers defendants "to appear pro hac vice in this [Texas] action on behalf of Defendant Trinity Industries, Inc." R2 at 47.

Another factual misstatement in the Petition for Writ of Certiorari is the claim by the Myers defendants that they represented Trinity in the Texas lawsuit for only eight months. Petition at 6. In fact, they represented Trinity in that Texas lawsuit for more than three years. R2 at 24, 26, 29-30, 47, 52-53, 68-71. Myers made this same factual misstatement in the affidavit that he filed with his motion to dismiss. In his Advisory to Court Regarding Modifications to the Affidavit of Richard J. Myers filed with the district court, Myers admitted that the statement that this Texas representation lasted only eight months

was "incorrect." R1 at 87. Yet Myers now makes the same factual misstatement to this Court.

Another factual misstatement in the Petition for Writ of Certiorari is the claim by the Myers defendants that they did not "derive revenue from . . . services rendered in the State of Texas." Petition at 5. Myers made this same statement in his affidavit filed with the district court. In his deposition he admitted that this statement was wrong:

> Q. . . . We can agree that you and your law firm have, in fact, derived revenue from services rendered in the state of Texas?
>
> A. Yes.
>
> Q. So the statement in the last sentence of paragraph five of your affidavit is false?
>
> A. It would appear that – I'm reading it myself – that it appears it needs clarification or something.
>
> Q. It needs to be changed, doesn't it?
>
> A. I guess it was just an error. . . .

R2 at 33. In his Advisory to Court Regarding Modifications to the Affidavit of Richard J. Myers, Myers admitted that the statement in his affidavit about not receiving revenue for services rendered in Texas was "erroneous." R1 at 87. Yet in his Petition he makes precisely the same factual misstatement.

In summary, contrary to the misstatements of fact in the Petition for Writ of Certiorari, the record is clear that the Myers defendants have had numerous significant contacts with the State of Texas, that they represented

Trinity in a Texas lawsuit for three years, and that they derived revenue from Trinity for legal services that they rendered to Trinity in Texas.

SUMMARY OF ARGUMENT

The Myers defendants are subject to the *in personam* specific jurisdiction of the district court in the Northern District of Texas. Trinity's causes of action stem from the fiduciary duty and other duties defendants owed their client Trinity and, therefore, arise out of or relate to defendants' contacts with the forum. Had the Myers defendants wanted to avoid contacts with Texas, they could have declined Trinity's requests for representation. The law cannot allow defendants to develop and benefit from an interstate attorney-client relationship focused in the client's home state only to later permit the defendants to betray that relationship without fear of accountability in the client's home state.

There is no good reason to grant a Writ of Certiorari in this case. The relevant legal rules are well established and noncontroversial. This case involves no more than the application of those rules to the unique facts of the case. The Fifth Circuit decided this case correctly. Its decision does not conflict with the decisions of any other Appeals Courts.

ARGUMENT

I. PETITIONERS ARE SUBJECT TO PERSONAL JURISDICTION IN TEXAS

A. Applicable Legal Standards

A defendant is amenable to the personal jurisdiction of a federal court sitting in diversity to the same extent that it would be amenable to the jurisdiction of a state court in the same forum. *Pedelahore v. Astropark, Inc.*, 745 F.2d 346, 347 (5th Cir. 1984). Trinity served the Myers defendants pursuant to the Texas long-arm statute, and because the Texas long-arm statute confers jurisdiction to the limits of the federal constitution, *Schlobohm v. Shapiro*, 784 S.W.2d 355, 357 (Tex. 1990) (citations omitted), the court need only consider the exercise of jurisdiction in view of the Due Process Clause of the Fourteenth Amendment. *Bullion v. Gillespie*, 895 F.2d 213, 215-16 (5th Cir. 1990).

An exercise of personal jurisdiction over a defendant comports with the requirements of substantive due process when 1) the defendant has enjoyed "minimum contacts" with the forum, *Int'l Shoe v. Washington*, 326 U.S. 310, 319 (1945); and 2) such an exercise of jurisdiction does not offend "traditional notions of fair play and substantial justice." *Burger King v. Rudzewicz*, 471 U.S. 462, 476-77 (1985).

Under the first prong of this due process test, a defendant has established minimum contacts if he has purposefully availed himself of the benefits and protections of the forum and its laws, *Hanson v. Denckla*, 357 U.S. 235, 253 (1958), and should reasonably expect to be

haled into court in the forum to defend himself in a lawsuit arising out of or related to that relationship. *World-Wide Volkswagen v. Woodson*, 444 U.S. 286, 295 (1980); *accord Burger King*, 471 U.S. at 474. This Court has emphasized that with respect to interstate contractual obligations, parties who "reach out beyond one state and create *continuing relationships and obligations* with citizens of another state" are subject to regulation and sanctions in the other state for the consequences of their activities. *Burger King*, 471 U.S. at 473 (emphasis added).

The second prong of the due process test, a reasonableness inquiry, involves an evaluation of several factors, including: 1) the burden on the defendant; 2) the interests of the forum State; and 3) the plaintiff's interest in obtaining convenient and effective relief. *World-Wide Volkswagen*, 444 U.S. at 292; *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 113 (1987). Often, the interests of the plaintiff and the forum will justify even serious burdens placed on nonresident defendants. *Asahi*, 480 U.S. at 114. These interests may serve to establish reasonableness of jurisdiction upon a lesser showing of minimum contacts than might otherwise be required. *Burger King*, 471 U.S. at 477.

B. Minimum Contacts

1. Purposeful Availment

Through numerous contacts, the Myers defendants willingly cultivated their attorney-client relationship with Trinity and obtained trade secrets and confidential information from Trinity. They later breached duties that arose from this relationship. To avoid answering for their

wrongs in Texas, the Myers defendants have denied that they took any affirmative steps to initiate or maintain their Texas business. When juxtaposed with a list of their Texas contacts, however, the declaration of the Myers defendants that they did not take affirmative steps to cause business activity in Texas appears disingenuous, at best.

The Myers defendants:

- made numerous trips to Dallas in connection with their representation of Trinity;
- represented Trinity in a Texas lawsuit as its lead trial counsel for three years;
- represented Trinity on myriad matters, handling as many as forty matters for Trinity during the relevant period of time;
- received legal assignments and requests for legal advice from the Dallas headquarters of Trinity;
- submitted bill statements to the Dallas headquarters of Trinity;
- were paid by checks sent from the Dallas headquarters of Trinity;
- made telephone calls to Texas;
- received telephone calls from Texas;
- corresponded to persons in Texas; and
- received correspondence from persons in Texas.

R2 at 3, 19-20, 26-28, 40-43, 47, 49, 50-51, 58-62, 64.

These factors provide a clear picture as to why the Myers defendants should have reasonably anticipated the

possibility of being haled before a Texas court. Petitioners were quite willing to reap the rewards of their relationship with Dallas-based Trinity and the State of Texas; now they must answer in Texas for their betrayal of that relationship. *See Mississippi Interstate Express v. Transpo, Inc.*, 681 F.2d 1003, 1007 (5th Cir. 1982); *Hylwa v. Palka*, 823 F.2d 310, 314-15 (9th Cir. 1987).

The Myers defendants maintain that their representation of Trinity and each resulting contact with Texas were initiated by Trinity, not by them. Petition at 22-23. As the Myers defendants would explain it, they were sitting in Illinois minding their own business when Trinity came along, offering them hundreds of thousands of dollars worth of legal work, which they accepted; and unilaterally connecting them with Texas. Presumably, the Myers defendants also did not choose to appear pro hac vice to represent Trinity matter in the Northern District of Texas – a representation that lasted three years – Trinity made them do it.

The arguments of the Myers defendants ignore the law and realities of both their legal practice and their relationship with Trinity. Their lucrative attorney-client relationship with Trinity was not unilateral like a car dealer's car being driven into a distant forum, *see World-Wide Volkswagen*, 444 U.S. at 298, but involved their choice to interact with Trinity over an eight-year period in the forum.

Trinity may originally have solicited the services of the Myers defendants, but they freely accepted and continuously pursued Trinity's business. In *Burger King*, this Court explained "that parties who 'reach out beyond one

state and create continuing relationships and obligations with citizens of another state' are subject to regulation and sanctions in the other State for the consequences of their activities." 471 U.S. at 473 (quoting *Travelers Health Ass'n v. Virginia*, 339 U.S. 643, 647 (1950)). Interstate actors, such as the Myers defendants who " 'purposefully derive benefit' from their interstate activities" may not later wield due process "as a territorial shield to avoid interstate obligations that have been voluntarily assumed." *Id.* at 473-74 (citations omitted). "To hold otherwise," the Fifth Circuit has explained, "would tend to immunize from suit by anyone with whom they do business, in any but their home jurisdiction, those engaged in nationwide commercial activity who conduct extensive commercial activity in other jurisdictions primarily by telephone or through the mails." *Mississippi Interstate*, 681 F.2d at 1010. If a nonresident wishes to avoid subjecting itself to the jurisdiction of a court in a particular state, the nonresident must structure its conduct so as to avoid that possibility. *See Thompson v. Chrysler*, 755 F.2d 1162, 1169 (5th Cir. 1985).

That Trinity may have initiated the contact with the Myers defendants or insisted that Myers travel to Texas in conjunction with his representation of Trinity is irrelevant. *See Lanier v. American Bd. of Endodontics*, 843 F.2d 901, 910 (6th Cir. 1988) ("[T]he question of which party solicited the business interface is irrelevant, so long as defendant then directed its activities to the forum resident." (citation omitted)), *cert. denied*, 488 U.S. 926 (1988).

For example, in *Equifax Services v. Hitz*, 905 F.2d 1355 (10th Cir. 1990), White & White Inspection and Audit Service, Inc. ("White & White"), a corporation with its

principal place of business in Kansas, hired the defendant, a California resident, as a branch manager for its southern California operations. *Id.* at 1357. In 1988, White & White merged with the plaintiff, a corporation with its principal place of business in Kansas. *Id.* Because the defendant objected to the merger, the defendant resigned from the plaintiff corporation to become director of a competing business in California. *Id.* The plaintiff filed suit in Kansas alleging, *inter alia*, that the defendant had violated a non-competition covenant in his employment contract. *Id.* The defendant argued that personal jurisdiction was lacking because his connections with Kansas were not purposeful – they were required by the plaintiff. The Tenth Circuit rejected the defendant's argument. "[W]hen forum contacts are a natural result of a contractual relationship, it indicates purposeful affiliation with the forum through an interstate contractual relationship." *Id.* at 1359.

The approach of the Myers defendants in objecting to personal jurisdiction demonstrates their failure to grasp a simple concept posited in *Burger King* and *Mississippi Interstate* – if a party does not wish to connect itself to a particular forum, then it should reject business offers from a resident of that forum. The Petitioners' lack of "fault" for the fact that their representation of Trinity involved significant contact with Texas is of little consequence in a jurisdictional inquiry. Indeed, it begs the question: Could the Myers defendants have structured their conduct so as to avoid contact with Texas? The answer to that question is clearly, "yes"; they could have declined the work. Instead, the Myers defendants chose

to reap the financial benefits of representing a Texas client.

The Myers defendants' further suggestion that their contacts with Texas were "random" and "fortuitous", Petition at 17, is disingenuous and confusing. There is nothing either random or fortuitous about agreeing to represent a Texas-based client, communicating with that client, asking to be admitted to practice before a Texas court, and billing the Texas-based client for both forum and non-forum related professional activities. *Cf. Mississippi Interstate*, 681 F.2d at 1009.

2. Respondent's Causes of Action Arise Out of or Relate to Petitioners' Contacts With Texas

Trinity's complaint alleges the formation of an attorney-client relationship with resulting duties and the breach of those duties. The Myers defendants represented Dallas-based Trinity as its counsel on various matters since 1984. R1 at 8. As part of this representation, including their activities in Texas, the Myers defendants acquired confidential information and accepted the fiduciary duty not to disclose Trinity's trade secrets and confidences to others. R1 at 7-8. In violation of their fiduciary duty, they disclosed confidential information to Johnstown America, a competitor of Trinity, which they acquired during their representation of Trinity. R1 at 9-10.

The Myers defendants do not contradict Trinity's assertion that they owe Trinity a fiduciary duty as a result of their representation. Nor do they deny that they acquired confidential information as part of their Texas-

based representation activities. Instead, they focus on the geographics of the alleged breach. The Myers defendants contend that because any betrayal of Trinity's confidences occurred in either Illinois or Pennsylvania, Trinity's causes of action arise out of or relate to conduct occurring outside of Texas.

This is wrong. The duty Petitioners owed to Trinity arose out of their representation of Trinity. The representation revolved around the client in Dallas. The Myers defendants obtained confidential information as part of their Texas-based activities and later disclosed this information to Johnstown America. But for the Texas contacts that established and nourished the fiduciary, attorney-client relationship with Trinity, there could be no breach. But for their contacts with Texas, the Myers defendants would never have entered, nor been able to sustain, the attorney-client relationship that benefited them and which they eventually violated. Therefore, Trinity's causes of action for breach of fiduciary duties arise out of or relate to the Texas contact, as required by *Burger King*, 471 U.S. at 472.

When the duty arises out of contacts with the forum state and the harm is felt in that state, it matters not that the breach occurred elsewhere. *Waterval v. District Court*, 620 P.2d 5 (Colo. 1980), *cert. denied*, 452 U.S. 960 (1981), is on point. The defendant, a Virginia attorney, had performed legal services for the plaintiff while the plaintiff was still a resident of Virginia. *Id.* at 7. The plaintiff then moved to Colorado, and the defendant attorney continued to render legal services for her from Virginia. *Id.* The plaintiff sued the attorney in Colorado for malpractice

based on legal services performed in Virginia. The Colorado Supreme Court upheld the exercise of personal jurisdiction in Colorado.

In *Waterval*, the attorney continued to represent the plaintiff after she moved to Colorado for a few years. *Id.* at 10. The attorney derived "monetary benefit" from the relationship. *Id.* Legal services that he performed in Virginia affected the financial interest of the plaintiff, a Colorado resident. *Id.* The attorney directed contacts and correspondence to the plaintiff after her move to Colorado. *Id.* The Colorado Supreme Court concluded that this was sufficient to support personal jurisdiction. *Id.* at 10-11.

Similarly, in this case, the Myers defendants represented Trinity for nearly a decade, derived "monetary benefit" from the relationship, affected the financial interests of Dallas-based Trinity, and directed telephone contacts and correspondence to Trinity in Dallas. In fact, the case for personal jurisdiction here is even stronger than in *Waterval*. In this case, the Myers defendants attended numerous meetings in Texas and actually represented Trinity as its lead trial counsel in a Texas lawsuit for three years. Those contacts were not present in *Waterval*.

Hylwa v. Palka, 823 F.2d 310 (9th Cir. 1987), is similar authority. The plaintiff hired the defendant, a Kansas accountant, then moved to California. *Id.* at 312. The defendant continued to render accounting services to the plaintiff after the move to California. *Id.* He rendered the vast majority of those accounting services in Kansas, traveling into California only a couple of days each year. *Id.* Even though the vast majority of the activities that

constituted the breach of duty occurred outside of the forum state, the Ninth Circuit upheld personal jurisdiction. *Id.* at 314-15.

In *Hylwa*, the Ninth Circuit concluded that the accountant, by contracting to provide accounting services after the plaintiff moved to California, "deliberately created 'continuing obligations' between himself and residents of the forum . . . [and] manifestly has availed himself of the privilege of conducting business there. . . . " *Id.* at 314 (quoting *Burger King*, 471 U.S. at 476). That the accountant rarely came into physical contact with California – and that the plaintiff originally hired the accountant in Kansas – did not defeat jurisdiction. *Id.* Jurisdiction over the Myers defendants is proper just as jurisdiction over the accountant in the *Hylwa* case was proper.

In *Entek Corp. v. Southwest Pipe & Supply*, 683 F. Supp. 1092 (N.D. Tex. 1988), the court implicitly rejected the argument that personal jurisdiction is limited to the forum in which the breach occurred. In *Entek*, the plaintiff, a Texas resident, entered into a distributorship agreement with the nonresident defendants that granted the defendants the right to sell the plaintiff's product in Florida. *Id.* at 1095. The defendants then signed confidentiality agreements in Texas promising not to misappropriate plaintiff's trade secrets. *Id.* Later, the defendants violated their agreements by producing a competing product outside of Texas. *Id.* Notwithstanding that the defendants breached the confidentiality agreement outside of Texas, the court concluded that the defendants' contacts with Texas supported a finding of specific jurisdiction over them. *Id.* at 1095, 1098. A similar result is warranted here.

The Myers defendants' contention that their misdeeds did not cause injury to Trinity in Texas misses the mark. They cite *Southmark Corp. v. Life Investors*, 851 F.2d 763 (5th Cir. 1988), in support of this contention. The *Southmark* court found that a district court in Texas lacked jurisdiction over a Virginia corporation that allegedly interfered with the contractual rights of the plaintiff, a company based in Texas. However, the court was quick to point out that "there is no evidence that the agreement was made or to be performed in Texas or governed by Texas law." *Id.* at 772.

The Tenth Circuit reviewed the effects of intentional tort allegations on personal jurisdiction in *Far West Capital v. Towne*, 46 F.3d 1071, 1077-79 (10th Cir. 1995) (examining *Calder v. Jones*, 465 U.S. 783 (1984), cited by Petitioners in Petition at 21, and its progeny, including *Southmark*). *Far West Capital* reiterates that the agreement at issue in *Southmark* was not made nor to be performed in Texas. *Id.* at 1079. This distinguishes *Southmark* from the case at bar, as the Myers defendants' fiduciary duty was created in Texas and manifested itself in Texas.

The Myers defendants purposefully availed themselves of the benefits and laws of Texas. They purposefully represented Texas-based Trinity, performed activities in Texas pursuant to that representation, received direction from Texas, asked to be admitted to practice before a Texas court, and reaped the financial benefits of the relationship. During this process, the Myers defendants obtained confidences that they have since disclosed to Trinity's competitor, resulting in a lawsuit in Pennsylvania. Petitioners thus purposefully engaged in an extended and continuing relationship with

Texas-based Trinity such that they could have reasonably anticipated being haled into court in Texas for a betrayal of that relationship. *Cf. Hylwa*, 823 F.2d at 314 (quoting *World-Wide Volkswagen v. Woodson*, 444 U.S. 286, 297 (1980)).

C. Traditional Notions of Fair Play and Substantial Justice

If the two part "minimum contacts" test for personal jurisdiction is satisfied, to escape jurisdiction a defendant must present a "compelling case" that the exercise of jurisdiction would offend traditional notions of fair play and substantial justice. *Burger King*, 471 U.S. at 476-77. Of the factors that the *Burger King* court identified as potentially relevant to this inquiry, only three are applicable here:

- " '[T]he burden on the defendant.' " *Id.* at 477.
- " '[T]he plaintiff's interest in obtaining convenient and effective relief.' " *Id.*
- " '[T]he forum State's interest in adjudicating the dispute.' " *Id.*

The Myers defendants have not sustained their burden of presenting a "compelling case" that the exercise of jurisdiction would be unfair in light of these factors. The first two factors, which involve convenience of the parties, balance one another. It is just as inconvenient for Trinity to litigate in Illinois or Pennsylvania as it is for the Myers defendants to come to Texas. R2 at 20. Trinity filed with its response to the defendants' dismissal motion an

affidavit of its Vice President F. Dean Phelps, Jr. That affidavit establishes that:

- Mr. Phelps will likely be a witness at trial, and trial in Illinois would "greatly inconvenience" him. R2 at 20.
- A Trinity corporate representative will likely attend the trial, and trial in Illinois would "greatly inconvenience the corporate representative." R2 at 20.
- The relevant documents are located in Dallas. R2 at 20.
- A Trinity custodian of records employed at its Dallas headquarters may need to testify. R2 at 21.

Defendants' protestations of inconvenience also lack a certain degree of credibility – Texas is convenient if defendants *represent* a party to a lawsuit, but is inconvenient if *they* are actual *parties* to a lawsuit. In any event, defendants' alleged inconvenience with Texas is not sufficient to render litigating in Texas unfair nor unreasonable. *See Polythane Sys. v. Marina Ventures Int'l*, 993 F.2d 1201, 1206 (5th Cir. 1993).

The third factor – the interest of the forum state – argues strongly for subjecting the Myers defendants to jurisdiction in Texas. Trinity has suffered injury in Texas as a result of their actions. As such, Texas has a "manifest" and "significant" interest in providing a forum for this action. *Burger King*, 471 U.S. at 473; *see also Entek*, 683 F. Supp. at 1098-99 ("[T]he forum state's interest would be served, because Plaintiffs are Texas residents whose business interests have been allegedly damaged.").

In summary, the Myers defendants do not come close to meeting their *Burger King* burden of showing a compelling reason why litigation in Texas would offend traditional notions of fairness. At best, the convenience factors are a wash, whereas the other applicable factor – the interest of the forum state – argues forcefully for personal jurisdiction in Texas.

II. THERE IS NO GOOD REASON TO GRANT A WRIT OF CERTIORARI IN THIS CASE

There are no "special" or "important" reasons for granting a Writ of Certiorari in this case. *See* Sup. Ct. R. 10.1 (1995). The Fifth Circuit's decision does not conflict with any decisions of this Court. The Fifth Circuit applied the legal rules announced by this Court in *Burger King*.

Nor does the Fifth Circuit decision conflict with decisions of other Courts of Appeals. The Myers defendants are wrong in claiming that the Fifth Circuit decision stands in "remarkable contrast," Petition at 15, with the following decisions of the Ninth and Eighth Circuit Courts of Appeals: *Sher v. Johnson*, 911 F.2d 1357 (9th Cir. 1990); *Austad Co. v. Pennie & Edmonds*, 823 F.2d 223 (8th Cir. 1987); and *FDIC v. Malmo*, 939 F.2d 535 (8th Cir. 1991). In fact, these decisions of the Eighth and Ninth Circuits are easily distinguished from the case at bar, and there is no disagreement among the circuits.

In *Malmo*, the only forum contact was a single letter sent by a nonresident attorney to the forum. *Id.* at 536. The *Malmo* court simply applied the well established, noncontroversial rule that "sporadic mail correspondence

alone usually does not constitute 'minimum contacts.' "[1] *Id.* at 537. In *Austad*, the only forum contact was a single trip. In stark contrast with the facts in *Malmo* and *Austad*, here the Myers defendants directed phone calls to Texas, sent bills to Texas, attended numerous meetings in Texas, provided legal services to Trinity while present in Texas, and represented Trinity as its lead trial counsel in a Texas lawsuit, all as part of an ongoing, eight-year attorney-client relationship.

Both the *Sher* and *Austad* cases, cited repeatedly by Petitioners, arose from the representation of a resident plaintiff by a nonresident law firm *in the law firm's forum.* In the case at bar, however, nonresident Petitioners represented Texas-based Trinity *in a Texas lawsuit and in Texas-based interstate matters including patent work. See Sher,* 911 F.2d at 1363 n.3 (finding such a distinction to be significant in a minimum contacts analysis).

In these and other cases cited by Petitioners in Petition at 16, except for the fact that in each of these cases the defendant was either an attorney or law firm, the facts bear little resemblance to those in the case at bar.

- Unlike this case, in no case cited by the Myers defendants did the nonresident law firm represent plaintiff on several matters. *See, e.g., Austad Co. v. Pennie & Edmonds,* 823 F.2d 223, 226 (8th Cir. 1987) (single representation in civil suit); *Biederman v. Schnader, Harrison, Siegal & Lewis,* 765 F. Supp. 1057,

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[1] One judge on the *Malmo* panel dissented, concluding that on the facts of that case a single letter directed to the forum supported personal jurisdiction.

1061 (D. Kan. 1991) (same); *Barnes v. Gerhard*, 834 S.W.2d 902, 903 (Mo. Ct. App. 1992) (same); *Weiss v. Greenburg, Traurig, Askew, Hoffman, Lipoff, Quental & Wolff*, 446 N.Y.S.2d 447, 449 (N.Y. App. Div. 1981).

- Unlike this case, in no case cited by the Myers defendants did the nonresident law firm represent the plaintiff three years as its lead trial counsel in a lawsuit in the forum state.[2] As with *Sher* and *Austad*, other cases cited by the Myers defendants in Petition at 16 involved representations in the law firm's forum, and not the plaintiff's forum. *See, e.g., Biederman v. Schnader, Harrison, Siegal & Lewis*, 765 F.Supp. 1057, 1059 (D. Kan. 1991) (Pennsylvania law firm represented Kansas resident in Pennsylvania action); *Barnes v. Gerhard*, 834 S.W.2d 902, 903 (Mo. Ct. App. 1992) (Illinois attorney represents Missouri Plaintiff in Illinois lawsuit); *Weiss v. Greenburg, Traurig, Askew, Hoffman, Lipoff, Quental & Wolff*, 446 N.Y.S.2d 447, 449 (N.Y. App. Div. 1981) (Florida attorney represented New York plaintiff in Florida proceeding).

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[2] In *Hill v. Sidley & Austin*, 762 F. Supp. 931 (S.D. Fla. 1991), the trial court declined to exercise personal jurisdiction over a Chicago law firm even though some of its lawyers had been admitted pro hac vice to practice law in Florida. *Hill* is distinguishable, however, because in that case the pro hac vice representations were for clients other than the plaintiff and were unrelated to the plaintiff's cause of action. By contrast, in this case, the Myers defendants represented Trinity as its lead trial counsel in a Texas lawsuit for three years. This is one of the Texas contacts that created the duty owed to Trinity, the breach of which is the basis for Trinity's cause of action in this lawsuit.

- Unlike this case, in no case cited by the Myers defendants was the resident plaintiff a major client of the nonresident law firm.
- Unlike this case, in no case cited by the Myers defendants did the nonresident law firm choose to foster and cultivate an attorney-client relationship with the resident plaintiff that spanned a decade and resulted in significant profit to the law firm.

CONCLUSION

For the reasons stated above, Trinity prays that the Court deny the Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

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